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SUPREME COURT, U.S.

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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL JOINT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION

01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP)

[April 13, 2004]

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

On November 3, 2003 this Court issued a Memorandum and Order in this consolidated class action holding that the conduct alleged by the various plaintiffs was impliedly immune from antitrust scrutiny. *See In re Initial Public Offering Antitrust Litig.*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003) ("*IPO Antitrust Litig.*").[1] On November 18, 2003, the Sherman Act Plaintiffs moved for partial reconsideration of that decision, arguing that this Court's dismissal of their state law antitrust claims was in error. Specifically, the Sherman Act Plaintiffs argue that this Court overlooked controlling decisions cited in their underlying briefs, principally *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), standing for the proposition that defendants failed to overcome the presumption against federal preemption of state law. For the reasons set forth below, the Sherman Act Plaintiffs' motion for partial reconsideration is denied.

BACKGROUND

In its November 3, 2003 Memorandum and Order, this Court held that the conduct alleged by plaintiffs was impliedly immune from application of the Sherman Act given the SEC's sweeping jurisdiction to regulate the

[1] Familiarity with this Court's November 3, 2003 Memorandum and Order, and the facts and defined terms set forth therein, is presumed.

national securities markets and its explicit congressional mandate to balance competition with its other regulatory policies. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 523-24. This Court also held that the federal securities regulatory regime entrusted to the SEC preempted the Sherman Act Plaintiffs' state law antitrust claims, holding that failure to apply such preemption would "eviscerate the implied immunity doctrine." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524. The Sherman Act Plaintiffs move this Court to reconsider only this latter portion of its earlier decision.

DISCUSSION

I. Standard for a Motion for Reconsideration

Local Civil Rule 6.3 provides in relevant part: "There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." A motion for reconsideration pursuant to Local Rule 6.3 "is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *Yurman Design, Inc.* v. *Chaindom Enter., Inc.*, No. 99 Civ. 9307 (JFK), 2003 WL 22047849, at *1 (S.D.N.Y. Aug. 29, 2003). Thus, to be entitled to reconsideration, a movant must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying motion, which, had they been considered "might reasonably have altered the result reached by the court." *Consol. Gold Fields* v. *Anglo Am. Corp.*, 713 F. Supp. 1457, 1476 (S.D.N.Y. 1989). Courts narrowly construe this standard and apply it strictly against the moving party "so as to avoid repetitive arguments on issues that have been fully considered by the court." *Lopez* v. *Comm'r of Soc. Sec.*, No. 01 Civ. 183 (NRB), 2002 WL 465298, at *1 (S.D.N.Y. Mar. 27, 2002). The decision to grant or deny a motion for reconsideration is within the sound discretion of

the district court. *See, e.g., Dietrich* v. *Bauer*, 76 F. Supp. 2d 312, 327 (S.D.N.Y. 1999).

II. Federal Preemption of State Antitrust Claims

The Sherman Act Plaintiffs fail to meet their burden for reconsideration. This Court did not overlook any controlling decisions in reaching its conclusion that the Sherman Act Plaintiffs' state antitrust claims are preempted by the federal securities regulatory regime. The parties fully briefed the issue of preemption of the state antitrust causes of action in their underlying motions, and this Court rejected plaintiffs' arguments based on *ARC America* and related cases. Their arguments are no more persuasive the second time around.

In this Court's view, *ARC America* is not a "controlling decision" with respect to the doctrine of implied immunity. In *ARC America*, the Supreme Court decided the question of whether the federal antitrust rule prohibiting indirect purchaser recovery preempted state antitrust laws expressly permitting such recovery. *ARC America*, 490 U.S. at 100. The question of whether federal antitrust law preempts contradictory state antitrust law is different and more narrow than the question presented here. In this case, the issue is whether the SEC's pervasive authority to balance competition against other forces in regulating the national securities markets, in combination with the its active regulation of and regulatory authority over the conduct alleged, renders that conduct impliedly immune from state antitrust scrutiny. As this Court held in its earlier decision, the answer to that question is yes. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524 ("To shield the securities regulatory regime from encroachment by the Sherman Act, only to expose that regime to assault by a swarm of state antitrust claims, would shatter the federal regulatory framework for national securities markets."); *cf. Boyle* v. *United Tech. Corp.*, 487 U.S. 500, 504-05 (1988) (allowing preemption of state law

by federal common law where the interests at stake are "uniquely federal" in nature).

However, even if this Court analyzed the question of implied immunity under the preemption framework described in *ARC America*, the result would be the same. It is "[a] fundamental principle of the Constitution" that Congress has the power to preempt state law. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *accord ARC America*, 490 U.S. at 100 ("It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law."). There is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as antitrust regulation, absent an express statement by Congress indicating such an intention. *ARC America*, 490 U.S. at 100. However, this presumption may be overcome in two instances:

> First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

ARC America, 490 U.S. at 100-01 (internal citations omitted) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

Here, the presumption is overcome. As this Court held in its prior decision, "the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct," and possesses a "unique mandate to balance competition with other market concerns." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 512, 523. Thus, allowing plaintiffs to use various state

antitrust regulations to balkanize the national securities regulatory regime would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *see* S. Rep. No. 94-75, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191 (noting that the SEC's "explicit obligation to balance . . . the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions."); *Finnegan* v. *Campenau Corp.*, 915 F.2d 824, 825-26 (2d Cir. 1990) ("It is recognized that competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established public policies."); *In re Stock Exch. Options Trading Antitrust Litig.*, No. 1283, M-21-79 (RCC), 99 Civ. 962(RCC), 2001 WL 128325, at *10 (S.D.N.Y. Feb. 15, 2001), *aff'd* 317 F.3d 134 (2d Cir. 2003) (noting the Commission's mandate to "balanc[e] the benefits of competition against its other regulatory aims."). Accordingly, preemption is appropriate even under the *ARC America* framework.

CONCLUSION

For the reasons set forth above, the Sherman Act Plaintiffs' motion for partial reconsideration of this Court's November 3, 2003 Memorandum and Order is denied.

Dated: April 13, 2004
New York, New York

SO ORDERED:

/s/
WILLIAM H. PAULEY III
U.S.D.J.

Copies mailed to:

[counsel list omitted in printing]